83-5966

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WENDELL BYRON DIXON,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

WENDELL DIXON
REGISTER # C-91266
STATEVILLE C.C. BOX 112
JOLIET, ILLINOIS 60434

Assisted by: John E. Murray Jr.
C-60247 Box 112
Law Student
Bur Oaks Library System
Stateville Branch
PRO SE .....

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

WENDELL BYRON DIXON,	)
	)
Petitioner,	)
	)
	)
-vs-	)
	)
	)
STATE OF ILLINOIS,	)
	)
Respondent.	)
	)

ON PETITION FOR A WRIT OF CERIORARI TO
THE APPELLATE COURT OF ILLINOIS, FIRST
DISTRICT, FIFTH DIVISION

WENDELL DIXON
REGISTER # C-91266
STATEVILLE C.C. BOX 112
JOLIET, ILLINOIS 60434

Assisted by : John E. Murray Jr.
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PRO SE.....

QUESTION PRESENTED FOR REVIEW

WHETHER THE COMMON PROCEDURE EMPLOYED BY THE PROSECUTION IN THEIR USE OF PEREMPTORY CHALLENGES TO EXCLUDE MINORITIES FROM A JURY, DEVIATING PETITIONER'S RIGHT TO A JURY REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS

INTRODUCTION

TO THE CHIEF JUSTICES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES :

MAY IT PLEASE THE COURT:

Wendell Byron Dixon, Petitioner, respectfully prays that a writ of certiorari issue to review the decision of the Appellate Court of Illinois, First District.

OPINOINS BELOW

The Opinion of the Appellate Court of Illinois, First District, Fifth Division, is reported at 105 Ill. App. 3d 340, 434 N.E.2d 369 (1982). A copy of the opinion is attached as Appendix A. A copy of the order of the Illinois Supreme Court denying leave to appeal from the judgement of the Appellate Court is attached as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C 1257 (3). The Opinion of the Appellate Court was filed on March 26, 1982. Leave to Appeal was denied by the Illinois Supreme Court on October 4, 1983. This Petition is being filed within sixty days of the Illinois Supreme Court's denial of review.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution
Article 6, Clause 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and of all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws..

STATEMENT OF THE CASE

Petitioner, Wendell Byron Dixon, a black man, was charged with two homicides, along with John Coleman. Pursuant to a motion for severance filed by Dixon separate juries heard the evidence during a joint trial. In the instant cause, Petitioner, in accord with the mandate of People vs. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748(1978), made an appropiate record for reviev, in that he filed a written motion immediately after jury selection but prior to opening arguments. This motion was supplemented by oral representations before the court. Those representations, were as follows : that the Petitioner, a black teen was being tried for a double murder before an all white jury where the crucial evidence against him was a highly controverted and hotly contested confession that would be introduced through a white police officer and white Assistant State's Attorney both of whom allegedly were the witnesses to the confession--indeed, practically every witness against the Petitioner was white and practically every witness for the Petitioner was black. There was a venire of 40 people, 8 of them were black. The State excercised 7 of its peremptory challenges, with 5 being used to exclude every black that was available amongst the first 12 jurors selected; the result was an all white jury with 70% of the States challenges being used against blacks who made up only 20% of the venire. The State allowed one black to sit on the jury but this was as the second alternative. Furthermore the five blacks who were excluded by the State had similar backgrounds to that of the whites who were selected.

And finally, the State made no effort to contradict this statement of the facts by defendant, although the court agreed that the statement was accurate (R.776-77,1480).

THE MANNER IN WHICH THE CONSTITUTIONAL CLAIM WAS RAISED

Petitioner, having made out a prima facie case, the burden then shifted to the State to establish that the peremptory challenges used against blacks were "reasonably relevant to the particular case on trial or its parties or witnesses," unrelated to exclusion because they were black. Here, the State refused to place into the record a reasonable basis for the exclusion of the blacks from the jury (R.776-778). Under the Wheeler doctrine the unrebutted prima facie case of the Petitioner should have been set for a mistrial, and jurors should have been reselected.

In the Appellate Court Dixon raised this claim also, and the identical claim was presented to the Illinois Supreme Court.

REASONS FOR ALLOWANCE OF THE WRIT

SINCE THE ISSUE OF WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS' GAURANTEE OF A TRIAL BY A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY IS VIOLATED BY THE PROSECUTION'S USE OF PEREMTORY CHALLENGES TO EXCLUDE ALL POTENTIAL BLACK AND MINORITY JURORS BECAUSE OF THEIR RACE, IS A SIGNIFICANT AND RECURRING QUESTION OF CONSTITUTIONAL LAW, IT IS THE DUTY AND OBLIGATION OF THIS COURT TO RESOLVE THE CONTROVERSY.

In their dissent from the denial of certiorari in McCray vs. New York, Miller vs. Illinois, and Perry vs. Louisiana, Justices Marshall and Brennan stated that those cases presented "a significant and recurring question of constitutional law: whether the State's use of peremptory challenges to exclude all potential Negro jurors because of their race violates a criminal defendant's right to an impartial jury drawn from a fair cross-section of the community." Justices Stevens, Blackmun and Powell, while maintaining that certiorari was properly denied, agreed with the dissenting Justices' appraisal of the importance of the underlying issue, but felt it to be a sound exercise of discretion to allow the States to serve as laboratories in which the issue recieves further study before it is addressed by the Court. 33 Cr. L. Rptr. 4067.

Illinois as a laboratory lacks consistency in culmination of this all important issue. People vs. Payne, 106 Ill. App.3d 1034(1982), set forth guidelines replete with reasons, and provided the criminal justice system an equitable arrangement for the State, prosecuting attorney, the defendant, and the Court itself, in a criminal trial. Nonetheless, other districts and divisions, and later the same Appellate court that handed this decision down, refused to apply it.

Petitioner contends that even under the frame work of the highly criticized Swain vs. Alabama,(1965),380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824, the preponderant number of cases in Illinois alone proves that"a systematic and purposeful exclusion of blacks from the jury, in case after case, raises a question under the fourteenth amendment, e.g. : People vs. Cobb, (Oct. 4, 1983)Nos. 52944,Ill. Sup. Ct., People vs. Davis, (1983) 95 Ill.2d 1; People vs. Gilliard, (1983) 112 Ill.App.3d 799; People vs. Newsome(1982), 110 Ill. App. 3d 1043; People vs Turner, (1982), 110 Ill. App. 3d 519 ; People vs. Gosberry, (1982) 109 Ill.App.3d 674; People vs. Teague,(1982), 108 Ill. App. 3d 891, People vs. Payne(1982), 106 Ill. App. 3d 1034; People vs. Belton(1982),105 Ill. App.3d 10, People vs Dixon (1982) 105 Ill. App. 3d 340; People vs. Gaines(1981), 88 Ill. 2d 342; People vs. Mims(1981), 103 Ill. App. 3d 673; People vs. Lavinder(1981), 102 Ill. App. 3d 662; People vs. Clearlee, (1981), 101 Ill. App. 3d 16; People vs. Vaughn, (1981) 100 Ill App. 3d 1082; People vs. Tucker,(1981), 99 Ill. App.3d 606; People vs. Allen(1981), 96 Ill. App.3d 871; People vs. Bracey, (1981), 93 Ill. App. 3d 864; People vs. Smith(1980), 91 Ill. App.

523, People vs. Fleming,(1980), 91 Ill. App.3d 99 ; People vs. Attaway, (1976), 41 Ill. App.3d 837; People vs. Thornhill, (1975) 31 Ill. App. 3d 779, People vs. King, (1973), 54 Ill. 2d 291; People vs. Powell, (1973), 53 Ill.2d 465; People vs. Petty,(1972) 3 Ill. App.3d 951, People vs. Fort(1971), 133 Ill.App. 2d 473; People vs. Butler,(1970), 47 Ill.2d 162; People vs. Cross, (1968) 40 Ill. 2d 85, People vs. Dukes(1960) 19 Ill 2d. 532; People vs. Harris,(1959), 17 Ill.2d 446.:

Further in the wording of Payne, supra, and Gillard supra, and from Justice Simon's recent dissent(Gosberry Illinois Supreme Court), 109 Ill.App. 3d 674 :" In view of the staggering number of cases in this State raising this issue, I question whether it has not been established that prosecutors in Illinois have been purposely and systematically using peremptory challenges in case after case to achieve the exclusion of black persons from juries in a State having one of the largest populations of black persons in the nation.

The Appellate Court recently noted:

It is an open secret that prosecutors in Chicago and elsewhere have been using their peremptory challenges to systematically eliminate all blacks, or all but token blacks, from juries in criminal cases where the defendants are blacks..... SINCE ALL OTHERS CAN SEE AND UNDERSTAND THIS, HOW CAN WE PROPERLY SHUT OUR MINDS TO IT?.....THERE COMES A POINT WHEN WE SHOULD NOT BE IGNORANT AS JUDGES OF WHAT WE KNOW AS MEN.....Watts vs. Indiana(1949), 338 U.S. 49, 52, 93 L.Ed. 1801, 1805, 69 S.Ct. 1347, 1349."

Whether this systematic use in Illinois of peremptory

challenges to exclude black jurors on the basis of race violates the equal protection clause of the fourteenth amendment even under the majority's interpretation of the standards announced by the Supreme Court in Swain calls for examination by this court.

Even if the sixth and fourteenth amendments to the Federal Constitution permit State prosecutors to use peremptory challenges systematica-ly to exclude black jurors, something I believe they do not, we, as judges of the supreme court of this State, have an independent obligation to apply our State Constitution to the defendant's claim. In fulfilling that obligation we are not bound by the precedent of the United States Supreme Court. I interpret article I, section 13, of our 1970 constitutional/togaurantee to each criminal defendant a trial by an impartial jury selected from a fair cross section of the community in which he is tried.(Ill. Const. 1970,art.I,sec.13). Our constitution also recognizes the equality of all citizens, regardless of race, as a fundamental public policy.(Ill. Const. 1970, art.I, sec.2.) I ask if we are being faithful to these important and constructive moral principles when we permit the State to use peremptory challenges to exclude black jurors from jury service soley on the basis of race.:"

Moreso, the Illinois Supreme Court on December 1, reversed the People of the State of Illinois vs. Stanley Payne, Nos. 56907-Agenda 56-May 1983, in a three page opinion, again Justice Simon dissenting, was very disturbed and he filed a 18 page dissent opinion, so Illinois is again back where it began.

The sheer number of case cited above in which this practice is alleged to occured indicates that the inaction by the Illinois Courts and the Federal Courts will encourage this practice in the future. This, will lead to the perception by circuit judges, prosecutors, attorneys, and the public generally that we are not only giving judicial sanction to racially discriminatory activity but are doing so in a way that is likely to undermine the jury system and pervert its goal of seeking the truth.

Petitioner can cite additional authorities throughout the United States which this court is very familiar with that have the same problem that Illinois faces, however to forsake

redundancy, he declines.

The reluctance of the States to decide whether the commands of the Sixth and Fourteenth Amendments forbid the prosecution's racially discriminatory use of the peremptory challenge should make it apparent that this court must exercise the leadership which it is constitutionally obligated to provide. No real benifit but many disadvantages will result from the continued litigation of this issue in the State and Federal Courts.

ACCORDINGLY, PETITIONER URGES THIS COURT THAT HIS CASE MERITS REVIEW BY THIS COURT.....

C O N C L U S I O N

WHEREFORE, PETITIONER WENDELL BYRON DIXON, PRAYS THAT A WRIT OF CERTIORARI ISSUE TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

RESPECTFULLY SUBMITTED,
Wendell Dixon
WENDELL BYRON DIXON

prepared by : John E. Murray Jr.
Law Student
Bur Oaks Library System
Stateville Branch
PRO SE.....

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Wendell Dixon, being first duly sworn upon oath, deposes and says , that I am the Petitioner in the above entitled cause; that in support of my motion to proceed in forma pauperis, I state the following:

1. That due to my poverty I am unable to pay the cost of said proceeding or to give security therefore;

2. That this Petitioner believes this Writ of Certiorari is meritorious.

3. That I have been granted leave to proceed as an indigent in all other appeals as to this cause.

4. That presently I no means of income and have no job, due to my incarceration.

5. That I have no money in any account, and own no real estate, bonds, stocks, notes, automobiles, or other valuable property.

Further, I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Wendell Dixon
WENDELL DIXON , Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 16th DAY OF DECEMBER, 1983

NOTARY PUBLIC
MY COMMISSION EXPIRES 1-14-86

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WENDELL BYRON DIXON,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

MOTION TO FILE PETITION FOR
A WRIT OF CERTIORARI IN FORMA PAUPERIS

Petitioner, Wendell Byron Dixon, Pro Se, moves that this Court grant permission to file his petition for writ of certiorari in forma pauperis pursuant to United States Supreme Court Rule 46.

In support of this Motion Petitioner states on oath:

1. That Petitioner in this case was granted leave to proceed as an indigent on appeal below.

2. Due to Petitioner's indigency, the Office of the Cook County Public Defender represented him on direct appeal and in the Illinois Supreme Court.

3. Petitioner's affidavit in support of this motion is attached hereto.

Respectfully Submitted,

Wendell Byron Dixon

Wendell Byron Dixon
#C-91266 Box 112
Stateville Correctional Center
Joliet, Illinois 60434

APPENDIX

ery for a single injury. As the court in *Manthei v. Heimerdinger* (1947), 332 Ill. App. 335, 75 N.E.2d 132 stated:

"It is an ancient doctrine that a release to one joint trespasser, or a satisfaction from him, discharges the whole. The same doctrine applies to all joint torts, and to torts for which the injured party has an election to sue one or more parties severally. * * * If it were not so, a party having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages; he might then sue another and settle in the same way, and repeat the proceedings as to all but one, and then sue him and recover the whole damage, as if nothing had been paid by the others. A door would thus be opened to a class of speculations that do not deserve encouragement. The rule of law which makes one satisfaction or release a bar to further claims for the same tort is founded in good reason." 332 Ill.App. 335, 350, 75 N.E.2d 132.

In the present case there is no such danger of double recovery since we have determined that plaintiffs' amended complaint alleges separate and distinct causes of action against Alper and National Union. Additionally, plaintiffs' amended Count I against Alper prays for "an amount equal to plaintiffs [*sic*] total loss suffered under this occurrence *less any sum or sums paid or to be paid by National Union* with reference to this subject matter." (emphasis added) Since National Union has already paid $1,250,000 in consideration for the release, Alper, if found liable, would only be accountable for the balance between this sum and the sum representing plaintiffs' total loss. Under these circumstances, there is no danger of double recovery, and the rationale for the above-quoted rule does not apply.

The recent decision in *Schrempf v. New England Mutual Life Insurance Co.* (1982), 103 Ill.App.3d 408, 59 Ill.Dec. 117, 431 N.E.2d 402, is inapposite to the case at bar as in that case the court found that the claim intended to be released included all types of actions. Here, we conclude that the release, though broadly discharging National Union from all actions, suits, etc., was clearly intended to settle only plaintiffs' claim against National Union arising from the contract of insurance.

[11] Since we have determined National Union and Alper are not joint-tortfeasors and are not concurrently liable for a single indivisible injury to plaintiffs, the release of National Union did not act as a release of Alper. See *Anderson v. Martzke* (1970), 131 Ill.App.2d 61, 67, 266 N.E.2d 137; *Cereal Byproducts Co. v. Hall* (1958), 16 Ill.App.2d 79, 83–84, 147 N.E.2d 383, *aff'd* (1958), 15 Ill.2d 313, 155 N.E.2d 14.

Accordingly, the judgment of the circuit court of DuPage County dismissing plaintiffs' complaint is reversed and the cause is remanded.

REVERSED AND REMANDED.

LINDBERG and NASH, JJ., concur.

105 Ill.App.3d 340
61 Ill.Dec. 216

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Wendell Byron DIXON, Defendant-Appellant.

No. 80–946.

Appellate Court of Illinois, First District, Fifth Division.

March 26, 1982.

Defendant was convicted in the Circuit Court, Cook County, William Cousins, Jr., J., of two counts of murder, and he appealed. The Appellate Court, Mejda, J., held that: (1) the evidence supported the conclusion that the defendant's confession was voluntary; (2) the defendant failed to pre-

serve for review the issue of whether the State's use of its peremptory jury challenges violated his constitutional right to an impartial jury where the record of voir dire was not preserved; (3) the testimony of a police officer about a codefendant's statements did not deny the defendant his right to confrontation of witnesses; (4) the trial court did not err in refusing two of defendant's tendered jury instructions; (5) the defendant waived any error in the trial court's denial of the jury's request for trial transcripts; and (6) the evidence was sufficient to sustain the conviction.

Affirmed.

1. Criminal Law ⇐519(1)

Test to determine whether confession is voluntary is whether accused's will was overborne at time he confessed, for if such is the case, the confession cannot be deemed to be product of rational intellect and free will.

2. Criminal Law ⇐531(3)

In determining whether confession was voluntary, trial court is not required to be convinced beyond reasonable doubt that confession was voluntary.

3. Criminal Law ⇐1158(4)

If trial court finds that confession is voluntary and has applied proper legal standard, on review, inquiry is limited to whether that finding is against manifest weight of evidence.

4. Criminal Law ⇐1158(4)

Trial court's decision that defendant's confession was voluntary was not against manifest weight of evidence, and, therefore, it was not necessary to suppress that confession.

5. Jury ⇐33(5.1)

Motives of prosecution in exercising peremptory challenges are not subject to examination absent showing of systematic pattern over time of excluding blacks from jury service. S.H.A.Const.Art. 1, § 8; U.S.C.A.Const.Amend. 14.

6. Criminal Law ⇐1115(2)

Consideration of defendant's challenge to composition of jury could not be made without adequate record of voir dire. S.H.A.Const.Art. 1, § 8; U.S.C.A.Const.Amend. 14.

7. Criminal Law ⇐1115(2)

Where proceedings in which jury selection occurred were not preserved in record, defendant's challenge to composition of jury would not be decided on basis of facts recited in defendant's written motion for mistrial made immediately after jury selection, supplemented by his oral representations before trial court. S.H.A.Const.Art. 1, § 8; U.S.C.A.Const.Amend. 14.

8. Constitutional Law ⇐268(6)

Sixth Amendment right of accused to confront witnesses against him is fundamental right, obligatory on states by Fourteenth Amendment. U.S.C.A.Const. Amends. 6, 14.

9. Criminal Law ⇐662(1)

Reason for right to confrontation is to afford criminal defendant opportunity to test truth of accuser's assertions. U.S.C.A. Const.Amends. 6, 14.

10. Criminal Law ⇐662(1)

Determination whether defendant's Sixth Amendment right to confrontation has been violated depends upon whether defendant has been deprived of right to test truth of direct testimony. U.S.C.A.Const. Amends. 6, 14.

11. Criminal Law ⇐662(1)

In murder prosecution, testimony of police officer regarding officer's interrogation of codefendant and subsequent location of murder weapon did not violate defendant's right to confront witnesses against him where there was nothing in testimony of police officer which would directly or expressly implicate defendant, nor did officer testify to substance of any statement by codefendant. U.S.C.A.Const.Amends. 6, 14.

12. Criminal Law ⇐769

Full function of instructions is to convey correct principles applicable to evidence

submitted to jury, so that jury may apply proper legal principles to facts gleaned and arrive at correct conclusion according to law and evidence.

13. Criminal Law ⇐805(1)

Decision whether to give tendered nonpattern instruction is always within discretion of trial court.

14. Criminal Law ⇐830

Instructions should not be given if they do not accurately state law.

15. Criminal Law ⇐830

In murder prosecution, defendant was not entitled to have trial court submit to jury nonpattern instructions which defendant alleged were necessary to protect him from "hearsay" which had been introduced where those instructions did not accurately reflect law on hearsay.

16. Criminal Law ⇐1039, 1044.1(1)

Defendant waived issue of whether trial court erred by denying jury's request for transcripts outside presence of counsel where defendant did not object to denial of transcript requests when that denial was made part of record and defendant did not raise that issue in written posttrial motion.

17. Homicide ⇐250

In murder prosecution, although only minimal physical evidence directly linked defendant with crime, there was evidence which, if believed, overwhelmingly supported finding of guilt, and, therefore, evidence supported conviction. S.H.A. ch. 38, ¶ 9–1.

Chester Slaughter, Chicago (Donald Hubert, Chicago, of counsel), for defendant-appellant.

Richard M. Daley, State's Atty. of Cook County, Chicago (Michael E. Shabat, Kevin Sweeney and Barbara A. Levin, Ass't State's Attys., Chicago, of counsel), for plaintiff-appellee.

MEJDA, Justice:

Defendant was convicted of two counts of murder (Ill.Rev.Stat.1973, ch. 38, par. 9–1) in a jury trial and sentenced to a minimum of 30 years and a maximum of 90 years for each count to run concurrently. Defendant appeals.

Defendant raises six issues on appeal: (1) whether the court erred in failing to suppress his confession; (2) whether the State's use of its peremptory jury challenges violated defendant's state constitutional right to an impartial jury; (3) whether defendant was denied the right to confront the witnesses against him; (4) whether the court erred in refusing two of defendant's tendered jury instructions; (5) whether the trial court erroneously denied the jury's request for trial transcripts; and (6) whether defendant was proved guilty beyond a reasonable doubt.

Wendell Dixon (defendant) and John Coleman were tried by separate juries during a joint trial for the murders of Barry Beckwith and Warren Jones. Only Dixon is involved in the instant appeal.

The following pertinent facts were adduced at trial. On Friday, April 30, 1976, the bodies of Beckwith and Jones were discovered in an alley at 8641 South Exchange in Chicago, Illinois. Both died of gunshot wounds. One of the bodies was found inside a 1973 Monte Carlo automobile, and the other was found outside of the car. A fired bullet was found lying on the ground next to the car. Four sets of fingerprints and another bullet were removed from the car's interior. On May 1, 1976, a person washing his car found a gun located underneath a car parked down from his own. Later that day Investigator McCabe picked up the gun. A firearm's expert testified that the bullet removed from the ground and a bullet removed from one of the victims were fired from the recovered gun. A fingerprint expert testified that one of the impressions taken from the car belonged to Coleman but that none of the impressions belonged to defendant.

Investigator John McCabe testified that on Saturday, May 1, 1976, he went to the home of John Coleman and took him down to the station for questioning. McCabe also

went to defendant's home, but he was not there at the time. Defendant's family testified that at approximately 6 p. m. that evening defendant accompanied by his parents and older brother went to the station. The State's witnesses testified that defendant was questioned by police officers for short periods of time at least five times during the evening of May 1, 1976. Both Investigators Russo and McCabe and Assistant State's Attorney Haddad testified that they read defendant his *Miranda* rights. Defendant was not handcuffed at any time. Defendant denied his involvement in the crime in all but the final interview. Investigator McCabe testified that at approximately 9:30 that evening he had a conversation with Coleman after which McCabe, another investigator, Coleman and Coleman's father left the police station and retrieved a gun, later identified as the murder weapon, from an individual who had found it in the alley under a car. After retrieving the weapon McCabe and Haddad, who again informed defendant of his *Miranda* rights, interviewed defendant. At this time defendant stated that he did in fact shoot Beckwith and Jones; that he and Coleman and another individual named Nixon put up some money to make a marijuana purchase; that there was an attempt or supposed robbery of Beckwith and as a result defendant got neither the marijuana nor his money back. Nixon, Coleman and defendant decided that they were either getting their money or the marijuana, or they would kill Beckwith and Jones. At the time of the murder defendant, Coleman, Beckwith and Jones were in Beckwith's car. They went into an alley at the rear of the 8600 block on Escanaba and argued, and defendant shot Beckwith in the back of the head and then shot Jones as Jones tried to get out of the car. Defendant gave the gun back to Coleman who hid it underneath a car. McCabe further testified that defendant refused to make a written statement at that time.

William Haddad testified that during the evening of May 1, 1976, and early morning of May 2, 1976, he first spoke with Coleman. After concluding his second conversation with Coleman before a court reporter at 1:45 a. m. on May 2, 1976, he spoke with defendant whose family was with him in the interview room. Haddad advised defendant of his *Miranda* rights and asked defendant if he wished to speak to him about the homicides. Defendant, responding that he did, asked his family to leave the room. Haddad then brought McCabe into the room. Haddad's testimony and that of McCabe as to defendant's confession corroborated each other. Haddad also testified that he wrote a memorandum with regard to defendant's statement which he later gave to his secretary.

In his defense defendant testified that on Friday, April 30, 1976, he attended classes at Fenger High School until 1 p. m., at which time he went to baseball practice. He practiced with his high school team until 5:30 and then left for home where he arrived at 6:30 p. m. After eating dinner he went to a park where he met his girlfriend and other friends. After 30 minutes he went to his girlfriend's house and stayed there until some time after 10 p. m. Around 11:30 p. m. defendant, his girlfriend, several of his friends, including John Coleman, went to a party where they stayed for two hours. Defendant and his friends then left looking for another party which they never found. Defendant testified he arrived home at approximately 3:30 a. m. on Saturday, May 1, 1976.

Defendant also testified to the events which occurred when he was questioned at the police station Saturday evening. In particular he testified that when he spoke with Haddad and McCabe that McCabe asked his parents to leave the room. After they left Haddad advised defendant of his rights. McCabe then asked defendant if he wished to make a statement, but defendant refused. Defendant testified that McCabe also told him that Coleman had made a statement and that they had the pistol. Defendant denied ever making the statement testified to by Haddad and McCabe. Defendant further testified that McCabe told him to just nod his head and say yes and they would let him go. Defendant then

nodded his head and McCabe and Haddad left the room. Defendant further testified that he had been questioned about 7 times by the police while at the station and had denied any knowledge about the murder about 15 times. Defendant admitted to having known Beckwith for about 11 years but denied knowing Jones. Defendant testified that he was handcuffed to a wall while at the police station.

Defendant's mother, father and brother testified in defendant's behalf. None offered testimony to corroborate his alibi. Their testimony was limited to events which occurred on May 1, 1976, and May 2, 1976. They testified that on Saturday, May 1, 1976, they arrived at the police station at approximately 6 p. m. Defendant was interviewed at least seven times during the evening and repeatedly denied involvement in the crime during those times when they remained with him when questioned. They testified further that defendant was handcuffed to the wall when questioned. Defendant's father left the station at approximately 1:30 Sunday morning but his mother and brother remained. At about 2:30 a. m. Haddad told the family to leave the interview room. Defendant was still handcuffed. Haddad and McCabe again interviewed defendant. When they came out of the room McCabe stated that defendant had given them a statement but did not tell the family the contents of the statement. Defendant's mother and brother left the station around 4 a. m. Prior to trial defendant made a motion to suppress the alleged confession he made to McCabe and Haddad. Defendant also moved for a mistrial contending that the State had improperly used its peremptory challenges to exclude black persons from the jury. Both motions were denied. The jury returned a guilty verdict upon which judgment was entered. Defendant appeals.

OPINION

[1-3] Defendant first contends that his confession was coerced and therefore was improperly admitted into evidence. The test to determine whether a confession is voluntary is whether the accused's will was overborne at the time he confessed, for if such is the case the confession cannot be deemed the product of a rational intellect and a free will. (*People v. Kincaid* (1981), 87 Ill.2d 107, 57 Ill.Dec. 610, 429 N.E.2d 508.) In making its decision the trial court is not required to be convinced beyond a reasonable doubt that the confession was voluntary. (*People v. Medina* (1978), 71 Ill.2d 254, 16 Ill.Dec. 447, 375 N.E.2d 78.) If a trial court finds that a confession is voluntary and has applied the proper legal standard, on review inquiry is limited to whether that finding is against the manifest weight of the evidence. (*People v. Kincaid*, 87 Ill.2d at 117-18, 57 Ill.Dec. at 614, 429 N.E.2d at 512; *People v. Brownell* (1980), 79 Ill.2d 508, 521, 38 Ill.Dec. 757, 404 N.E.2d 181, 188, *cert. dismissed*, 449 U.S. 811, 101 S.Ct. 59, 66 L.Ed.2d 14 (1980).) That is, an opposite conclusion must be clearly evident. (*Ritter v. Hatteberg* (1957), 14 Ill.App.2d 548, 145 N.E.2d 119.) Defendant has not challenged the legal standard applied by the trial court, but rather asserts that the totality of the following circumstances surrounding defendant's confession demonstrates its involuntariness: defendant's youthful age; the duration of his interrogation; the lateness of his confession; police requests of defendant's brother, mother and girlfriend to talk defendant into telling what he knew; the absence of family members during police interrogation; and finally the handcuffing of defendant during questioning.

[4] The uncontradicted evidence showed that defendant was 18 years old and was of normal intelligence. Although as defendant asserts he was in custody for at least seven hours prior to his confession, he was not continuously interrogated during that time. He was questioned intermittently for brief periods. Significantly, a 4-5 hour break occurred immediately prior to his confession during which no questioning occurred at all by police. Furthermore, while Sergeant Russo did admit to asking defendant's brother if he "would go over and talk to [defendant] to find out what happened" and to telling defendant "that his mother

and brother could talk with him, and he could say anything he wanted to with them," defendant never "confessed" to any member of his family. Additionally, defendant never testified that any of his family members asked him to tell what he knew, but only described his conversation with them as "just talk[ing] casually." The uncontradicted evidence also showed that defendant was not kept in isolation during custody but had access to his family members and girlfriend at all times, except for three or four questioning periods. Furthermore, defendant had been informed of his rights by Haddad.

Additionally, certain contradicted evidence was before the trial court. While defendant's witnesses testified that defendant had been handcuffed and that his confession occurred at approximately 3 a. m., the State's witnesses testified that defendant had not been handcuffed and that his confession occurred at approximately 1 a. m. Furthermore, while defendant's brother testified that Russo requested him to talk to defendant at approximately 10 p. m., Russo testified the request was made at 8:00 p. m. Finally, defendant denied making any confession as recounted by the State's witnesses, but testified to merely nodding his head to McCabe's alleged statement, "* * * just shake your head and we'll let you go." When we consider as we must all of the evidence surrounding the making of defendant's confession (*People v. Kincaid* (1981), 87 Ill.2d 107, 429 N.E.2d 508), including the contradicted evidence, best resolved by the trial court (*People v. Medina* (1978), 71 Ill.2d 254, 375 N.E.2d 78), which is in the best position to determine the credibility of the witnesses and the weight to be accorded their testimony (*People v. Lester* (1981), 102 Ill.App.3d 761, 58 Ill.Dec. 416, 430 N.E.2d 358), we cannot say that the trial court's decision that defendant's confession was voluntary was against the manifest weight of the evidence. Therefore, the trial court properly denied defendant's motion to suppress his confession.

[5] Defendant next asserts that he established a *prima facie* case, unrebutted by the prosecution that he was denied his state constitutional right to be tried by "an impartial jury of the county" in which the crime was allegedly committed (Ill.Const. 1970, art. I, § 8) by the prosecution's use of its peremptory challenges to exclude black persons from the jury. Under *Swain v. Alabama* (1965), 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 decided on equal protection grounds, the motives of the prosecution in exercising peremptory challenges are not subject to examination absent a showing of a systematic pattern over time of excluding blacks from jury service. A similar position has been taken by the Illinois Supreme Court in *People v. Harris* (1959), 17 Ill.2d 446, 161 N.E.2d 809, *cert. denied*, 362 U.S. 928, 80 S.Ct. 755, 4 L.Ed.2d 747 (1960); *cf. People v. King* (1973), 54 Ill.2d 291, 296 N.E.2d 731; *People v. Powell* (1973), 53 Ill.2d 465, 292 N.E.2d 409; *People v. Heard* (1971), 48 Ill.2d 356, 270 N.E.2d 18; *People v. Butler* (1970), 46 Ill.2d 162, 263 N.E.2d 89.

The defendant cites *People v. Wheeler* (1978), 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890, in which the California Supreme Court considered whether the prosecution's use of peremptory challenges violated defendant's right to an impartial jury under the California Constitution. Defendant urges this court to adopt the rationale enunciated in that case. In *Wheeler* the defendants were black and the victim was white. The prosecution peremptorily challenged all the black veniremen. The California Supreme Court reversed the defendants' convictions holding that when a defendant has made a *prima facie* case that the prosecution has excluded veniremen on the basis of their race, the prosecution has the burden to show that its exclusion of the jurors was based on other grounds. Under *Wheeler* the defendant must meet the following requirements to establish a *prima facie* case: (1) he must make as complete a record as feasible; (2) he must establish that the excluded persons are members of a cognizable group; and (3) he must show a strong likelihood that such persons are being challenged because of their group asso-

ciation rather than because of any specific bias. 22 Cal.3d 258, 280, 583 P.2d 748, 764, 148 Cal.Rptr. 890, 905.

The Illinois Supreme Court has recently declined to consider the issue of whether it should adopt the *Wheeler* standard, where the defendant did not challenge the racial composition of the jury until all the jurors had been sworn and where the defendant failed to make a record showing that the veniremen who were peremptorily challenged by the prosecution were black. (*People v. Gaines* (1981), 88 Ill.2d 342, 58 Ill.Dec. 795, 430 N.E.2d 1046, 1054.) As our supreme court pointed out, such a showing is required even under *Wheeler*.

[6, 7] Similarly, a consideration of defendant's challenge here to the composition of his jury cannot be made in the absence of an adequate record of the *voir dire*. For without an adequate record there is nothing to review. In the instant case the proceedings in which jury selection occurred have not been preserved. In lieu of a record of those proceedings, defendant urges us to consider the facts recited in his written motion for a mistrial made immediately after jury selection, supplemented by his oral representations before the trial court. However, Supreme Court Rules 323(c) and (d) which set out the necessary procedure for a bystander's report of proceedings or an agreed statement of facts are specifically applicable to criminal appeals. (Ill.Rev. Stat.1979, ch. 110A, pars. 323(c), 323(d) and 612(c).) We cannot accept statements of counsel in lieu of a duly prepared and authenticated report of proceedings. (*People v. Poliquin* (1981), 97 Ill.App.3d 122, 52 Ill. Dec. 290, 421 N.E.2d 1362.) The trial court did note when entertaining defendant's motion for a mistrial that no black persons were among the first twelve members of the jury. (One black person did serve on the jury as second alternate.) The court also stated that "perhaps four blacks were excluded on the peremptory challenges by the State." However, without a record of the *voir dire* we cannot review the questions posed to and the responses of the veniremen. Thus, we cannot preclude the possibility that the prosecutor found those black persons excused from the jury were unqualified for reasons wholly unrelated to race. *People v. Bracey* (1981), 93 Ill.App.3d 864, 49 Ill.Dec. 202, 417 N.E.2d 1029.

Defendant next asserts that the testimony of Officer McCabe regarding his interrogation of John Coleman and the subsequent location of the murder weapon violated defendant's Sixth Amendment rights to confront the witnesses against him.

The substance of McCabe's testimony to which defendant objected at trial was that on May 1, 1976, he had talked with Coleman and defendant at Area 2 headquarters. Subsequently, Coleman, Coleman's father, another investigator and McCabe went to a residence at 86th and Muskegan and retrieved a gun, later identified as the murder weapon. After returning to Area 2 headquarters McCabe again talked with Coleman. After taking Coleman's statement McCabe talked with defendant who then confessed to shooting Beckwith and Jones.

Defendant does not contend that he was unable to confront McCabe, but rather that he was unable to confront Coleman who implicitly testified against defendant through McCabe's testimony.

[8–11] The Sixth Amendment's right of an accused to confront witnesses against him is a fundamental right, obligatory on the states by the Fourteenth Amendment. (*Pointer v. Texas* (1965), 380 U.S. 400, 403, 85 S.Ct. 1065, 1067, 13 L.Ed.2d 923.) The reason for the right to confrontation is to afford a criminal defendant the opportunity to test the truth of his accuser's assertions. (*People v. Bryant* (1976), 36 Ill.App.3d 293, 343 N.E.2d 617.) Therefore, determination of whether a defendant's Sixth Amendment right to confrontation has been violated depends upon whether defendant has been deprived of the right to test the truth of direct testimony. (*People v. Bryant; People v. Tennant* (1976), 65 Ill.2d 401, 3 Ill. Dec. 431, 358 N.E.2d 1116, *cert. denied*, 431 U.S. 918, 97 S.Ct. 2184, 53 L.Ed.2d 229 (1977); see also *Pointer v. Texas; Douglas v. Alabama* (1965), 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934; *Bruton v. United*

States (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476.) However, it has been held that an accused's right to confrontation is not violated by the testimony of a police officer that he effected an arrest subsequent to the confession of an accomplice when the statements testified to did not expressly or directly implicate the defendant. (*People v. Williams* (1977), 52 Ill.App.3d 81, 9 Ill.Dec. 735, 367 N.E.2d 167.) There is nothing in the testimony of Investigator McCabe which would directly or expressly implicate defendant nor did McCabe testify to the substance of any statement made by Coleman. He testified to the fact that he talked with defendant "* * * after we took the written statement [presumably of Coleman]." Defendant's objection to the latter statement was sustained. As the *Williams* court noted "* * * the jury could reasonably infer from the testimony in question that [Coleman] implicated defendant * * * but that inference is not so immediate to mandate reversal * * *." (52 Ill.App.3d at 87, 9 Ill.Dec. at 738, 367 N.E.2d at 172.) Here, as in *Williams*, McCabe's testimony was confined to his physical activities and to the bare occurrence of his conversation with Coleman, and hence was not improper.

Defendant next contends that the trial court committed reversible error by refusing to submit either of two jury instructions tendered by him which were not Illinois Pattern Jury Instructions. Defendant argues that these instructions were necessary to protect him from the "hearsay" which had been introduced into the record by McCabe's testimony with reference to his conversations with Coleman, the testimony we have just discussed, and by defendant's testimony that McCabe told him that Coleman "had made a statement on [him]."

[12–15] The sole function of instructions is to convey the correct principles of law applicable to the evidence submitted to the jury, so that the jury may apply the proper legal principles to the facts gleaned and arrive at a correct conclusion according to the law and the evidence. (*People v. Dordies* (1978), 60 Ill.App.3d 621, 18 Ill.Dec. 92, 377 N.E.2d 245.) The decision whether to give a tendered non-IPI instruction is always within the discretion of the trial court. Instructions should not be given, however, if they do not accurately state the law (*People v. Farris* (1980), 82 Ill.App.3d 147, 37 Ill.Dec. 627, 402 N.E.2d 629) or if they are misleading or confusing. (*People v. Dordies.*) The two non-IPI instructions which defendant asserts were required to protect him from the prejudicial effects of hearsay testimony read as follows:

(3) You are instructed that you should not consider as evidence any testimony concerning either statements or actions of another party who is not on trial before this court.

(4) Statements or actions of another person made against the defendant outside of his presence should not be considered by you as evidence in this trial.

These tendered instructions do not accurately reflect the law relative to hearsay testimony. As stated by the supreme court in *People v. Carpenter* (1963), 28 Ill.2d 116, 121, 190 N.E.2d 738, 741, " '[h]earsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.' [Cite omitted.]" Defendant's tendered instructions imply that any statement or conversation concerning another or made outside of the defendant's presence is inadmissible. Such is not the law. (*People v. Carpenter.*) As neither of these two instructions tendered by defendant accurately stated the law, they were properly rejected by the trial court.

Defendant next asserts that the trial court erred by denying the jury's request for transcripts outside the presence of counsel. Although the trial court did make the jury's request and the resulting denial a matter of record, defendant asserts additional error in that the record is silent as to whether defense counsel was present at

that time. The State contends that defendant has waived this issue by failing to object to the denial of the transcript request when that denial was made a part of the record and by failing to raise the issue in his written post-trial motion. The State also correctly points out that defendant has not included his post-trial motion in the appellate record before this court.

[16] It has been held that the failure to object to the court's denial of the jury's request for trial transcripts and the failure to raise such objection in one's post-trial motion constitutes a waiver of the issue. (*People v. Whitley* (1977), 49 Ill.App.3d 493, 7 Ill.Dec. 350, 364 N.E.2d 511.) We agree with the State's argument. The party who brings a cause to the reviewing court must present a record which fairly and fully presents all matters necessary and material for a resolution of the issues presented. (*People v. Bonner* (1979), 68 Ill.App.3d 424, 25 Ill.Dec. 95, 386 N.E.2d 366.) On review the reviewing court is restricted in its examination of the record as it is. (*People v. Edwards* (1978), 74 Ill.2d 1, 23 Ill.Dec. 73, 383 N.E.2d 944, *cert. denied*, 442 U.S. 931, 99 S.Ct. 2862, 61 L.Ed.2d 299 (1979).) In the record before us there is neither an objection by defendant to the court's denial of the jury request at the time the matter was made of record, nor a written post-trial motion in which the issue has been raised by defendant. Accordingly, on the record before us we conclude defendant has waived this issue.

[17] Lastly, defendant contends that his conviction should be reversed because the evidence was insufficient to sustain his conviction. He argues that the occurrence and voluntary nature of his confession were controverted, that minimal physical evidence linked him to the crime and that his alibi was unrebutted. Although we agree with defendant that minimal physical evidence directly linked him to the crime, defendant's contention is undermined by the testimony of the police investigator and the Assistant State's Attorney that defendant confessed to the killing. The jury was free to choose between their testimony and his denial (*People v. Tennant* (1976), 65 Ill.2d 401, 3 Ill.Dec. 431, 358 N.E.2d 1116, *cert. denied*, 431 U.S. 918, 97 S.Ct. 2184, 53 L.Ed.2d 229 (1977)) and was under no obligation to believe defendant's alibi evidence. (*People v. Tennant; People v. Brown* (1972), 52 Ill.2d 94, 285 N.E.2d 1.) Whether or not defendant was proved guilty beyond a reasonable doubt in this case is largely a matter of the credibility of the witnesses. A court of review will not substitute its judgment for that of the trier of fact on questions of witness credibility. (*People v. Manion* (1977), 67 Ill.2d 564, 10 Ill.Dec. 547, 367 N.E.2d 1313, *cert. denied*, 435 U.S. 937, 98 S.Ct. 1513, 55 L.Ed.2d 533 (1978).) Since there is evidence here which, if believed, overwhelmingly supports a finding of guilt, we will not substitute our judgment for that of the jury. *People v. McElroy* (1980), 81 Ill.App.3d 1067, 36 Ill.Dec. 931, 401 N.E.2d 1069.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

LORENZ and WILSON, JJ., concur.

105 Ill.App.3d 350
61 Ill.Dec. 224

Lucius McNEIL, a/k/a Lucius J. Harris, Jr., Individually and natural father and next friend of Lucius McNeil, Jr., a minor, Plaintiffs-Appellants,

v.

Willis G. DIFFENBAUGH, M.D.; Fernando Jordan Pascual, M.D.; South Chicago Community Hospital, a corporation, and George McNeil Teaming Company Inc., an Illinois corporation, Defendants-Appellees.

No. 80-2195.

Appellate Court of Illinois,
First District, Fifth Division.

March 26, 1982.

Employee filed multicount negligence action individually and as natural father

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

JULEANN HORNYAK
CLERK

October 4, 1983

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AREA CODE 217
782-2035

Mr. Wendell Byron Dixon
Reg. No. C-91266
Box 112
Joliet, IL 60434

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 7209 - People State of Illinois, respondent, vs. Wendell Byron Dixon, petitioner.

The portion of the motion by petitioner for leave to file a petition for leave to appeal and for appointment of counsel is denied. The part of the motion for leave to sue as a poor person is allowed.

Appendix

Exhibit B

JULEANN HORNYAK, CLERK